

Access to Menstrual Products is a Constitutional Right. Period.

#layda Eskita#ç#o#lu

2019-12-05T18:18:36

“Periods are not a luxury – lower the tampon tax!”

These were the exact words of Nanna-Josephine Roloff and Yasemin Kotra, who started a [petition](#) launched on International Women’s Day in 2018. As a result of their successful campaign, the German Parliament (*Bundestag*) [passed a legislation](#) including value added tax (VAT) changes incorporated into the German tax code on 7 November 2019. Taking effect as of 2020, the sales tax on menstrual products¹⁾ For the context of this blog post, “menstrual products”, also known as menstrual hygiene materials, refer to the products used to catch menstrual flow, such as sanitary pads, tampons, pantyliners, menstrual cups and period panties. Although this blog post focuses on how period poverty and the discriminatory aspect of the “tampon tax” predominantly affects women, menstruating transgender and gender non-conforming persons are respectfully acknowledged. For this purpose, the term “menstrual products” have been used instead of “feminine hygiene products”. Thus, the emphasis on “women” within the text should be read bearing this point in mind. will be reduced from 19 percent, for those classified as “luxury goods”, to 7 percent. While most international human rights instruments as well as constitutions are silent on the issue of access to menstrual products, the “tampon tax” reveals a deep gender bias in tax systems around the world. This bias is not only detrimental to the socio-economic rights of women but it is also unconstitutional as sex-based discrimination.

Period Poverty

Despite promising global legislative trend which is the fruit of consistent campaigning by women’s rights activists, it remains shocking that menstrual products were classified as “luxury goods” for several decades. It has been well-known that women having their periods is not a matter of choice but a biological need. So, how could this be possible? The tax legislators being predominantly male, or the taboo culture around menstruation could be among the answers. One thing is for sure: the heavy taxation has contributed to the phenomenon of period poverty.

Simply put, period poverty is the struggle many (mostly low-income) women and girls face while trying to afford menstrual hygiene products, specifically, the increased economic vulnerability they face due to the financial burden caused by supplies such as sanitary napkins, tampons, pain medication and underwear. Period poverty is not only about financial poverty. It is combined with the stigma around menstruation which silences girls and often leaves them unprepared and uninformed about managing their periods.

In Nepal, an ancient Hindu tradition of “untouchability” known as [“chhaupadi”](#) is still practised in some rural areas. It involves banishing menstruating women and girls to mud huts or sheds for the duration of their period. Although it was banned in 2005, the practice remains widespread. High levels of vaginal infections have been [reported](#) by health workers in South-Eastern Turkey within Syrian refugee communities, mainly due to poor menstrual hygiene management. In [Sub-Saharan Africa](#), poverty and embedded gender inequalities cause pubescent girls dropping out of school or even engaging in transactional sex to obtain money to buy sanitary towels so that they can continue to attend school. Period poverty is not only a problem of the global South. A [2017 survey by Plan International](#) found that in the UK, as many as 1 in 10 girls and women aged 14 to 21 are unable to afford sanitary products, and 12 percent improvise with makeshift menstrual protection such as toilet roll, socks, rags and even newspapers.

Being at the intersection of UN Sustainable Development Goals (SDGs) 4 (quality education), 5 (gender equality), and 6 (clean water and sanitation), elimination of period poverty and access to menstrual products are crucial for sustainable development. Addressing period poverty, many activists have commonly named their agenda as “menstrual equity” referring to equal access to hygiene products, but also to education about reproductive health. The unaffordability of menstrual products, mainly due to unfair taxation, remains to be one of the biggest barriers in this context.

Menstrual hygiene as a human rights issue

Apart from being a developmental topic related to gendered poverty, menstrual hygiene is a [human rights issue](#). The question is: what can be the legal basis for access to menstrual hygiene? Let’s take a look at the international human rights frameworks first. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the right to health, (“the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”) and the Committee on Economic, Social and Cultural Rights (CESCR) further sets forth four essential elements of the right to health: availability, accessibility, acceptability and quality (the [AAAQ framework](#)) with its [General Comment 14](#). In addition, Article 3 addresses the equal rights of men and women, and forbids discrimination on the ground of sex. Taking all of these into consideration with a broad interpretation, women’s access to affordable, acceptable menstrual products of a certain quality can be accepted as a socio-economic right. Except for a brief mention of the need for States to take affirmative measures for the modification of social misconceptions, prejudices and taboos about menstruation in its [General Comment 22](#) on the right to sexual and reproductive health, the CESCR is rather silent about menstrual hygiene.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides for equality of men and women regarding access to health care services (Article 12) and rural women’s rights to enjoy adequate living conditions, particularly in relation to sanitation (Article 14/2(h)). However, there are no clear references to menstrual hygiene or access to products. The Committee on the Elimination of All Forms of Discrimination Against Women advised States to ensure

rural women's access to *“adequate sanitation and hygiene, enabling women and girls to manage their menstrual hygiene and have access to sanitary pads”* in its [General Recommendation 34](#) on the rights of rural women. This was followed a few years later with a brief statement of concern regarding the lack of appropriate sanitary protection materials and lack of information on puberty and menstrual issues in terms of girls' school environments in [General Recommendation 36](#) on the rights of girls and women to education.

The regional human rights documents and mechanisms, apart from references to women's right to sexual and reproductive health, are also silent about access to menstrual hygiene. The right to health is absent from the European Convention on Human Rights and although there is a well-established case-law of the European Court of Human Rights on health-related issues, there is no jurisprudence considering access to menstrual products. Similarly, the American Convention on Human Rights (except for the non-discrimination principle in Article 1), the Convention of Belém do Pará, and the African Charter on Human and Peoples' Rights (except for the non-discrimination principle in Article 2 and the right to health in Article 16) have no provisions related to the right to sanitation. Women's right to sexual and reproductive health is only provided within the Maputo Protocol to the African Charter on the Rights of Women in Africa (Article 14). However, the right to sanitation and access to menstrual products are surprisingly missing, considering how comprehensive the Protocol is. Neither the Inter-American Court, nor the African Court has case-law on access to menstrual products.

The taxation of menstrual products as sex-based discrimination

Consequently, considering access to menstrual products under sexual and reproductive health as a socio-economic right, the international and regional human rights documents do not provide a satisfactory, comprehensive legal basis. Moreover, the common questions may arise regarding progressive realization approach, and the justiciability of socio-economic rights, especially in legal systems, as in Germany and Canada, where constitutions are silent on such rights.

Maybe we should change and narrow down our question to shift its focus from access to menstrual hygiene to unfair taxation of menstrual products specifically, and address it within another legal area, in relation with another right. The unjust taxation of menstrual products as “luxury goods” is an issue of discrimination on the basis of sex, and it might be a more favourable option to approach it from a constitutional perspective. The legal arguments can be based on the right to be free from discrimination rather than social and economic rights. Considering that the sales tax and VAT are largely matters of domestic law for each state, arguments for tax reduction can be grounded on the non-discrimination principles embedded within the constitutions, be it Article 3 of German Basic Law, Article 10 of the Turkish Constitution, or Article 14 of the Spanish Constitution, which all forbid discrimination on the ground of sex.

It should be made very clear at this point that although this blog favors a constitutional perspective, arguments based on international human rights law are still very relevant. As [Bridget J. Crawford](#) perfectly puts: *“The tampon tax is a human rights issue because menstrual hygiene-and affordable access to menstrual hygiene products-is inextricably linked to rights to health, sanitation, education, dignity, and work, among other rights.”* Although there have been no cases before the ECtHR or the ECJ challenging the tampon tax, there are several tax cases before the ECtHR such as *Van Raalte v. the Netherlands* (1997), *Willis v. United Kingdom* (2002), and *Zeman v. Austria* (2006), that recognize gender-differentiated taxes as a form of impermissible discrimination.

But how is the taxation of menstrual products discriminatory? Simply put, because tampon tax is a sex-based tax. Menstrual products are predominantly used and purchased by biological women, even though men can occasionally purchase these products for a partner, child or a family member. There are two main arguments that are relevant at this point: criticism towards menstrual products being taxed as luxury goods and not as basic goods which is in line with the recent legislative trend in Europe, and criticism towards the taxation of menstrual products as a whole, which is the US approach to menstrual equity. In many countries there is no comparable tax on any sex-based medical product overwhelmingly used by men. Gender neutral medical products such as band-aids, or products that are used by men, such as erectile dysfunction medication or male condoms are either tax-exempt or taxed as basic goods. Thus, this differential sales tax treatment on menstrual products is discrimination on the ground of sex, and imposes a unique economic burden on women.

Although the tax reduction trend around the world has been primarily legislative, there is a parallel judicial movement. In late 2018, the Colombian Constitutional Court held that imposing a 5 percent VAT on menstrual products was unconstitutional. The ground-breaking [Decision C-117 of 2018](#) struck down the tampon tax underlining that the legislative body’s margin of discretion in taxation cannot infringe principles of reasonableness and non-discrimination. The decision was supported with arguments on how the taxation of menstrual products was never fully discussed in the Congress, how access to menstrual products as irreplaceable goods is closely linked with women’s ability to participate in public life, the different impact which VAT has on women because of the structural barriers before the fulfilment of their economic potential, and rural women’s limited access to alternative products. All in all, the taxation was found to constitute indirect, intersectional discrimination against women, with a specific emphasis on the disproportionate economic burden it puts on women of low socio-economic status.

Crawford and Waldman, in their brilliant article [“The Unconstitutional Tampon Tax”](#), recall Justice Antonin Scalia’s famous words in *Bray v. Alexandria Women’s Health Clinic*: *“A tax on wearing yarmulkes is a tax on Jews.”* It is hard to disagree with them that the taxation of menstrual hygiene products constitutes an analogous situation. Just as it would be discriminatory on Jews to tax yarmulkes as “luxury goods” while taxing other religious clothing as basic goods, taxing menstrual products which are inextricably linked to female hygiene as luxury goods while taxing other medical

products as basic goods, is discriminatory and unconstitutional. A tax on menstrual products is indeed a tax on women.

Time to move

Germany's long-awaited tax regulation is rather overdue. Many legal circles have witnessed cases of promising, progressive activism which resulted in tax reductions on menstrual products. Kenya was [the first state to repeal](#) added tax on sanitary pads and tampons in 2004. This was followed by EU regulations allowing taxes on menstrual products to be as low as 5 percent. Canada lifted the federal tax on menstrual hygiene products in 2015, followed by Australia, India and Malaysia in 2018. In the EU, UK, France, the Netherlands and Luxembourg have decreased taxes, and most recently, following the [European Commission's proposal in January 2018 for new rules to give Member States more flexibility to set VAT](#), Spain [announced](#) the super-reduced rate of 4% on menstrual products that is applied for "basic need products". In 2018, Turkish MP Serra Kadıgil [proposed a draft bill](#) to decrease the 18 percent VAT on menstrual products to 5 percent. In the United States, nearly a dozen states have eliminated sales tax on menstrual products, and [22 states are considering](#) legislation to do so.

In a nutshell, for many years, female consumers around the world were burdened with differential sales tax. However, menstrual equity and elimination of period poverty are now a part of the gender equality agenda. There are many cases of total elimination of the tampon tax, as in Colombia, Canada and India and other cases in which sanitary products are freely provided in schools, universities, libraries and many public spaces in Scotland. As a bare minimum, the discriminatory taxation of menstrual products as luxury goods must be prevented through legislative action. While the latest legislation passed in the *Bundestag* raises hopes that other states might follow Germany, it raises more questions about the deeply gendered tax system and the historic stigma around menstruation.

References

- 1. For the context of this blog post, "menstrual products", also known as menstrual hygiene materials, refer to the products used to catch menstrual flow, such as sanitary pads, tampons, pantyliners, menstrual cups and period panties. Although this blog post focuses on how period poverty and the discriminatory aspect of the "tampon tax" predominantly affects women, menstruating transgender and gender non-conforming persons are respectfully acknowledged. For this purpose, the term "menstrual products" have been used instead of "feminine hygiene products". Thus, the emphasis on "women" within the text should be read bearing this point in mind.

